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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HUGO SLUIMER,

Plaintiff,

v.

VERITY, INC., a corporation, and THE VERITY INC. CHANGE IN CONTROL AND SEVERANCE BENEFIT PLAN,

Defendants.

E-FILING

CASE NO. C 08 1220 SI

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Date: July 18, 2008
Time: 9:00 a.m.
Ctrm: 10, 19th Floor

The Honorable Susan Illston

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

A. PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Hugo Sluimer's Opposition to Defendants' Motion for Summary Judgment is being submitted in the context of Plaintiff's own Cross-Motion for Summary Judgment (the "Cross-Motion"), which was filed on June 13, 2006. Plaintiff's Cross-Motion contains a detailed "Statement of Facts" and a series of declarations and exhibits. Therefore, in this Opposition, Plaintiff will simply give an abbreviated version of those facts which are relevant to the issues raised in Defendants' Motion for Summary Judgment. And, rather than submit new declarations, Plaintiff will refer in this Opposition to the declarations and exhibits submitted by Plaintiff along with his Cross-Motion. Further, to the extent necessary, plaintiff incorporates all of the arguments made in his Cross-Motion herein as if stated in full.

B. BRIEF FACTUAL BACKGROUND

For 15 years, Plaintiff Hugo Sluimer ("Sluimer") worked for Defendant Verity, Inc. In 2005, Sluimer was Verity's Senior Vice President for EMEA and APAC Operations.[1] In December 2005, Autonomy Corporation acquired Verity and began reviewing which Verity jobs would be deemed "redundant". *Sluimer Dec.*, Ex. B, HS 017. In January 2006, Sluimer was told that his job was likely to be found redundant, but that Autonomy was still reviewing matters to see if another "suitable" job could be found for him. *Id.,* ¶7; Ex. B, HS 017, 020–021, 023, 028, 031, 032.

Under the Verity Change in Control and Severance Benefit Plan ("Plan"), employees who experienced a "covered termination" within 18 months after a Change in Control were entitled to certain Plan benefits. *Sluimer Dec.*, Ex. A, HS 003 (¶2(g)). There were two types of "covered terminations": a termination by the company without cause, or a "constructive termination." *Id.*, HS 002 (¶2(f)). A constructive termination included situations in which the employee

[1] *Sluimer Dec.*, ¶2. In this job, Sluimer was responsible for all of Verity's operations outside of the Americas, with more than 100 reports, including 10 country managers. Sluimer oversaw operations generating $50,000,000 in revenue, and was responsible for all aspects of Verity's operations outside the Americas, including sales, marketing, finance, administration, technical operations and consultants. *Id.*

experienced a "substantial reduction in duties or responsibilities." *Id.*

On March 23, 2006, Sluimer received a letter informing him that the company had found a "suitable" job for him in Autonomy's Nuerodynamics division. *Sluimer Dec.*, Ex. B, HS 035–036. The letter did not explain what Sluimer's job duties or responsibilities would be or who he would report to. Sluimer spent the next month communicating with Andrew Kanter and David Humphries in an effort to understand what this "new" job would involve. *Id.,* at ¶9; Ex. B, HS 037–054. Following a meeting with Humphries on April 18th, and after Kanter finally gave Sluimer a written job description on April 24th, Sluimer wrote to Kanter on April 25th and informed him that it was apparent that Autonomy was not going to provide him with a comparable job.[2] *Id.,* at HS 054–055.

Sluimer proceeded to take legal action to enforce his rights under the Plan. On April 27, 2006, Sluimer served Autonomy with a lawsuit in the Netherlands seeking a cash severance payment, based on the fact that Autonomy had failed to offer him a comparable job following the Change in Control. *Sluimer Dec.*, Ex. B, HS 054; *Reilly Dec.*, Ex. C, HS 360–369; *Pijl Dec.*, Ex. A, HS 124–186. On May 1, 2006, Sluimer sent a letter to the Plan Administrator (Jack Landers, the VP of Human Resources) seeking his other benefits under the Plan, i.e., his accelerated stock vesting and medical benefits. *Sluimer Dec.*, Ex. B, HS 057.

During May 2006, Kanter and Autonomy asserted that Sluimer was not entitled to any Plan benefits. First, Kanter wrote to Sluimer on May 3rd and rejected Sluimer's May 1, 2006 application for Plan benefits. *Id.*, at HS 058. Kanter made this decision even though: (1) Kanter was not the Plan Administrator; and (2) it was blatantly obvious that the "new" job offered to Sluimer would result in a "substantial reduction" in Sluimer's duties or responsibilities. Second, Kanter and Autonomy opposed Sluimer's claim in the Dutch Court that he was entitled to cash severance benefits. Kanter and Autonomy argued that Sluimer was not entitled to payments

[2] As described in Plaintiff's Cross-Motion and in the Declaration of Sluimer, Neurodynamics only had 15 employees and only two of those would report directly to Sluimer; Neurodynamics' revenue was only about $5,000,000; and Sluimer would only be responsible for the sales function. This was a dramatic reduction in duties and responsibilities from his job at Verity and so constituted a "constructive termination" under the Plan. *Sluimer Dec*, ¶¶2, 8.

under the Plan, since he had been offered "immediate reemployment" in a suitable job and so had not been "terminated."[3] *Reilly Dec.*, Ex D, HS 370–388; Ex. F, HS 405–407; Ex. G, HS 408–409; *Pijl Dec.*, Ex. A, HS 188–311, 333–336; Ex. C, HS 352–355.

In early June 2006, following an exchange of written briefs and documentary evidence (*Reilly Dec.*, Exs. C–F), and after a May 30th hearing before the Judge in which Kanter gave testimony against Sluimer (*Reilly Dec.*, Ex. G; *Pijl Dec.*, ¶¶3–10), the Dutch Court rejected Defendants' arguments, found that Sluimer had not been offered a comparable job, and awarded Sluimer a cash severance payment of over € 1,000,000.[4] *Reilly Dec.*, Ex. H, HS 410–412.

Despite the overwhelming evidence presented in the Dutch Court that Sluimer had experienced a substantial reduction in duties or responsibilities and so had been constructively terminated, and despite the Dutch Court's ruling, Kanter again denied Sluimer's claim for Plan benefits on July 6, 2006, stubbornly asserting that Sluimer had been offered "immediate reemployment" and had not been "constructively terminated." *Sluimer Dec*, Ex. B, HS 059–060. Once again, Kanter made the decision on Sluimer's claim for Plan benefits, despite the fact that Kanter was not the Plan Administrator. Finally, after Sluimer sent a letter to the Plan Administrator on July 13, 2006 asking for a "review" of Kanter's denial, Kanter wrote back to Sluimer on September 29, 2006 and again denied Sluimer's claim. *Id*., at HS 061–062; 065–067.

C. SUMMARY OF LEGAL ARGUMENTS

In an effort to avoid the payment of ERISA Plan benefits which are clearly due Sluimer, Defendants have raised a handful of frivolous legal arguments. First, Defendants claim that Sluimer did not sign certain documents which were a "pre-condition" to eligibility under ther

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[3] The "immediate reemployment" argument which Defendants made to the Dutch court under Section 3(b)(iii) of the Plan (*Reilly Dec.*, Ex. D, HS 378–379, ¶¶22–25) is the same argument which Defendants are making now in their Motion for Summary Judgment. Similarly, Autonomy argued to the Dutch Court that Sluimer had not signed certain documents required as a "pre-condition" of receiving Plan benefits–the same argument Defendants also make here. *Reilly Dec.*, Ex. D, HS 377; *Pijl Dec.*, Ex. A, HS 196–197.

[4] In the lawsuit pending before this Court, Sluimer is not seeking any cash severance benefits under the Plan, as that issue has been resolved by the Dutch Court. Rather, Sluimer is seeking the other Plan benefits due to him, which consist of: 1) accelerated stock options and 2) medical benefits.

Plan, including a Release. In fact, Defendants never provided these documents to Sluimer to sign, even though Sluimer always said that he would sign such documents if Defendants were going to give him his Plan benefits. Furthermore, Sluimer was not required to go through the futile gesture of signing these documents, because Defendants consistently told Sluimer that he was not eligible for benefits because there had not been a "covered termination." Thus, "signing" these documents would have been meaningless.

Second, Defendants contend that Sluimer was not eligible for Plan benefits because he was offered "immediate reemployment." Defendants' argument completely ignores the Plan provision which grants Sluimer Plan benefits if his "new" job involves a substantial reduction in duties or responsibilities. Obviously, these two provisions must be read together. Giving someone "immediate reemployment" does not eliminate his right to Plan benefits if the "reemployment" involves a grossly inferior job. In fact, that is not "reemployment" at all: rather, "reimployment" must mean in the same or a comparable position. Otherwise, the "constructive termination" provision would be meaningless. Furthermore, even if that were not the case, the "immediate reemployment" provision is only applicable if there has been no "lapse in pay." Here, Sluimer suffered a significant diminution in pay.

Third, Defendants claim that Sluimer did not notify Defendants that he had been "constructively terminated" within the proper time frame. In fact, the three month "notice" window began in late April 2006, when Sluimer finally obtained a description of what the job duties and responsibilities would be in the "new" job being offered to him. On April 25, 2006, May 30, 2006, and again on July 13, 2006, Sluimer informed Defendants in writing that his "new" job involved a substantial reduction in his duties and responsibilities and that he had thus been "constructively terminated" under the Plan. Thus, Sluimer gave Defendants timely notice. Furthermore, even without this explicit notice, Defendants were fully aware on May 1, 2006 that Sluimer was applying for benefits under the Plan and had a duty to inform him what was necessary to perfect his claim.

Fourth, Kanter was not the Plan Administrator and so was not entitled to make decisions with respect to whether Sluimer should or should not receive Plan benefits. To make matters

even worse, Kanter had a clear bias against Sluimer and a *per se* conflict of interest.

Finally, with respect to Sluimer's third cause of action, Defendants failed to provide Sluimer with the documentation requested by Sluimer, and so statutory penalties are warranted.

II. LEGAL ARGUMENT

Defendants make three principal arguments in connection with their motion for summary judgment.[5] Each is meritless for multiple reasons.

A. THE FACT THAT SLUIMER HAD NOT SIGNED A RELEASE OR OTHER AGREEMENTS IS IRRELEVANT

Defendants first argue that summary judgment should be granted because Sluimer did not sign a "Release of Claims" and did not "confirm in writing" that he would be subject to certain Confidentiality and Non-Compete Agreements. Defendants claim that, under the Plan, Sluimer must do these two things as a "condition precedent" of receiving Plan benefits. There are at least three major flaws with Defendants' argument.

1. Claim Cannot Be Denied Based Upon Failure to Execute Release/Separation Agreements

Per the terms of the Plan, execution of a general waiver and release, and confirmation that the plan participant was subject the Company's Confidentiality Agreement and Non-Compete Agreement (hereinafter collectively referred to as "Release/Separation Agreements") needed to be done for the Plan participant to "receive benefits." *Sluimer Dec*, Ex. A, pp. 004, 008. Contrary to the assertions in defendants' motion, execution of said documents was not a condition precedent to participation in the Plan or eligibility for benefits. *Defendants' Mot.* 3:18, 5:8, 9:13, 15:22, 17:18-20:5. It was a condition precedent to receiving benefits. The Plan only provides that to "receive benefits" the Release/Separation Agreements must be executed. Here, the Plan Administrator never determined that Sluimer was eligible to "receive

[5] Defendants initially characterize their motion as a motion to dismiss under FRCP12(b)(6), for "failure to state a claim". However, such a motion cannot be based on evidence extrinsic to the Complaint. Here, Defendants base their motion largely on the Declaration of Andrew Kanter and on various letters and other documents attached as exhibits to his Declaration. Thus, on its face, a motion under 12(b)(6) is improper and must be denied.

benefits" and, thus, he was never obligated to execute the Release/Separation Agreements per the terms of the Plan.

Moreover, the Plan Administrator's denial of Sluimer's claim based upon his purported failure to execute the Release/Separation Agreements establishes that the denial of Sluimer's claim was improper and not authorized by the terms of the Plan. A refusal to execute the Release/Separation Agreements cannot be an independent reason to deny a claim. It can only be a reason to withhold otherwise payable benefits, i.e. the Plan participant that submitted a payable claim cannot "receive benefits" until the Release/Separation Agreements are executed.

2. Sluimer Never Refused to Sign The Release or Other Documents, and Defendants Never Sent Sluimer Any of the Documents to Sign

Defendants insinuate that Sluimer "refused" to sign the Release/Separation Agreements. This is simply false. Sluimer repeatedly informed Defendants that he would sign these documents, but that he understood and expected that Defendants would send him these documents once Defendants had confirmed the award of Plan benefits.[6]

The irony of Defendants' "failure to sign" argument is that Defendants never sent Sluimer any of these documents to sign, i.e., Defendants never sent Sluimer a Release or a Confidentiality Agreement or a Non-Compete Agreement. *Sluimer Dec.*, ¶¶10, 11. Moreover, on November 12, 2007, when Defendants produced "Verity Inc.'s Change in Control and Severance Plan (with Exhibit A thereto)," they did not include copies of the Releases which they now maintain are part of the Plan. Nor did they provide copies of the purported Confidentiality or Non-Compete Agreements, despite requests for those documents. *Reilly Dec.* Ex A, HS-0095-123.

Under ERISA, the Plan Administrator was required to provide "[a] description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary." 29 C.F.R. § 2560.503-1(g)(iii). Neither the Plan Administrator nor anyone else ever provided copies of the Release/Separation

[6] *Sluimer Dec*laration, ¶¶10, 11. Sluimer informed Defendants that he would sign these documents both in his own correspondence with the company, and in his Dutch Court pleadings. *See*, *Sluimer Dec*, Ex. B, HS 061, 068–069; *Reilly Dec.*, Ex. D, HS 377 (¶19); Ex. E, HS 399, 401 (¶¶32, 33, 34, 36).

Agreements, thus purportedly preventing Sluimer from perfecting his claim. Since Defendants never gave Sluimer these documents, it is especially brazen for Defendants to now complain that Sluimer "failed" to sign them – especially since he told Defendants that he would sign them.[7]

3. Sluimer Is Not Required to Perform Futile Acts

Even if Sluimer had signed a Release and had confirmed in writing that he would be subject to Verity's Confidentiality and Non-Compete Agreements, Defendants still would not have given him his Plan benefits. Since April 2006, Defendants have taken the consistent position that Sluimer is not entitled to Plan benefits because he did not suffer a "covered termination." Defendants have always argued that Sluimer was given "immediate reemployment" following the change in control; that he was given a "comparable" job; and that Sluimer was not "terminated" within the meaning of the Plan.[8] At no point have Defendants ever stated or suggested that, if Sluimer were to sign these three documents, that Defendants would suddenly grant him his Plan benefits and give him his stock options. *See*, *Sluimer Dec.*, ¶¶10, 11. To the contrary, Defendants have adamantly denied that Sluimer ever experienced a "covered termination."

Under ERISA and basic contract law, Sluimer is not required to tender performance of any obligations if such performance would be futile. Where one party has effectively repudiated

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[7] Defendants apparently assume that Sluimer should have received a "form" Release as an "exhibit" to the Plan in April 2005. However, the Plan document which Sluimer received from the company in 2005 did not have any of the form Releases attached as exhibits, nor did the Plan document produced in November 2007. *Sluimer Dec*, ¶¶10, 11; *Reilly Dec.* Ex A, HS-0095-123. Furthermore, no version of the Plan has a Confidential Information Agreement or a Non-Compete Agreement attached to it, even as an exhibit. Kanter Declaration, Exhibit A.

To the extent that the "form" Release contained a single sentence which states, "I hereby confirm my obligations under the Company's proprietary information and inventions agreement", and that this was intended to serves as the "confirmation in writing" contemplated by the Plan, then Defendants' failure to provide Sluimer with a Release also constituted a failure to provide him with the "writing" he was supposed to sign regarding the Confidential Information and Non-Compete Agreements. Kanter Dec., Ex. A, p. 18.

[8] This was Kanter's position between April and September 2006; is what Defendants argued to the Dutch Court in May 2006; and is what Defendants still claim today. *Sluimer Dec*, Ex. B, pp. 035–036; 040–044, 052–053, 058-060, 065–067; Reilly Dec, Ex. D, HS 372–373, 378–385; Ex. F, HS 405–407; Ex. G, HS 408–409; Kanter Dec., ¶¶ 9, 10, 13.

the contract or made it clear that it will not perform its obligations, there is no need for the other party go through the meaningless gesture of performing its own obligations or even offering to perform. *See Dishman v. UNUM Life Ins. Co. of Am.,* 269 F.3d 974, 984-85 (9th Cir.2001). Sluimer's performance of any purported "condition precedent" to receiving Plan benefits is thus excused; it would be meaningless for him to sign a Release when Defendants would still refuse to provide him with Plan benefits.

The four cases cited by Defendants simply re-affirm this point.[9] In each case, the company had found that the claimant entitled to Plan benefits. The only hold-up to payment of benefits was the employee's refusal to sign the Release which was required by the Plan as a condition of receiving the benefits. This is in contrast to our case, where the employer has *denied* that Sluimer is entitled to Plan benefits under any circumstances.[10]

B. DEFENDANTS' CLAIM OF "IMMEDIATE REEMPLOYMENT" IS FRIVOLOUS

Defendants claim that Sluimer is not eligible for Plan benefits because he was offered "immediate reemployment". There are two major flaws with Defendants' argument.

1. If Sluimer's "Immediate Reemployment" Involved a Substantial Reduction in Duties and Responsibilities, a "Constructive Termination" Occurs

The purpose of the Plan is to provide severance benefits to Verity employees who, within 18 months after a Change in Control, experience a "covered termination". *Sluimer Dec*, Ex. A, HS 001, 003 (Sections 1 and 3(a)). A "covered termination" arises in two situations: 1) the employee is involuntarily terminated by the company without cause, or 2) the employee is "constructively terminated." *Id.,* at HS 003 (Section 2(f), (g)).

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[9] *Lockheed v. Spink* (1996) 517 U.S. 882; *Loskill v. Barnett Banks*, 289 F.3d 734 (11th Cir. 2002); *Bender v. Xcel Technology*, 507 F.3d 1161 (8th Cir. 2007); *Harlan v. Sohio Petroleum*, 677 F.Supp. 1021 (N.D.Cal. 1988)

[10] Defendants claim that Sluimer could not have signed a Release without waiving his Dutch lawsuit claims. But Sluimer was prepared to sign the proper documents, including a Release. *Sluimer Dec.*, ¶11. Furthermore, the parties had agreed in 2005 that the cash portion of his severance payment would be governed by Dutch law rather than by the Plan calculation. Thus, any Release signed by Sluimer would simply need to address that issue.

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As discussed in Sluimer's Cross-Motion for Summary Judgment, the "alternative" job offered to Sluimer in 2006 involved a "substantial reduction" in his duties and responsibilities, resulting in a "constructive termination" under Section 2(f)(I). Because Sluimer experienced a "covered termination," he was entitled to Plan benefits.

Defendants argue that Sluimer falls within one of the "exceptions to benefit entitlement." Specifically, Defendants claim that Sluimer was "offered immediate reemployment by a successor to the Company . . . following a change in ownership of the Company." *Sluimer Dec.*, Ex. A, HS 003 (Section 3(b)(iii)).

Defendants' position is that, as long as they continue to employ Sluimer following a Change of Control, Sluimer cannot claim an entitlement to benefits–even if Defendants employ him in a new job that involves a drastic reduction in duties and responsibilities. In essence, Defendants argue that the Court should look only at Section 3(b)(iii) of the Plan and completely ignore Section 2(f)(I). Defendants' interpretation of the Plan defies common sense, undermines the obvious purpose of the Plan, and violates every rule of contract interpretation.

The reason for the "constructive termination" provision of Section 2(f)(I) is to ensure that employees who have their job duties or responsibilities substantially reduced following a Change in Control receive Plan severance benefits.

By contrast, the reason for the "immediate reemployment" exception in Section 3(b)(iii) is obvious. When Company X is acquired by Company Y, it is common that the employees of Company X are "terminated" as a technical matter (since Company X no longer exists), but they immediately morph into employees of Company Y and are transferred to Company Y's payroll, doing the same job without any break in service. The purpose of the exception in Section 3(b)(iii)–"immediate reemployment"--is to make clear that such employees do not become entitled to Plan benefits simply because they were technically "terminated" by Company X.

Defendants' proposed interpretation would render Paragraph 2(f)(I) meaningless and irrelevant. Under Defendants' logic, if the President of Verity had his salary maintained but was then given a job as a janitor at Autonomy following the Change in Control, the President could

not claim that he had been constructively terminated, even if he had obviously suffered a substantial reduction in job duties and responsibilities. According to Defendants, the President had been given "immediate reemployment" with "no lapse in pay", and so the President would not be eligible for Plan benefits!

Defendants' proposed interpretation is nonsensical. Under basic principles of contract interpretation and ERISA, a Court must interpret contract's written terms in context of entire agreement's language, structure, and stated purpose. *Trustees of Southern Cal. IBEW-NECA Pension Trust Fund v. Flores*, 519 F.3d 1045, 1047 (9th Cir.2008). Similarly, "The first choice, when construing a contract is, of course, to give effect to all of its provisions. Only when that is impossible, should a court choose to apply one clause and ignore another." *Arizona Laborers, Teamsters and Cement Masons Local 395 Health and Welfare Trust Fund v. Conquer Cartage Co.,* 753 F.2d 1512, 1519 (9th Cir. 1985). Furthermore, if, after applying the normal principles of contractual construction, the contract is fairly susceptible of two different interpretations, another rule of construction, *contra proferentem*, will be applied, and the interpretation that is most favorable to the party that did not draft the contract will be adopted. *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 538-40 (9th Cir.1990); *Blankenship v. Liberty Life Assur. Co*., 486 F.3d 620, 625 (9th Cir.2007).

This is especially true here because the Plan Administrator did not issue the decision on the claim and exercised no discretion. Additionally, the doctrine of reasonable expectations applies as a principle of federal common law controlling interpretation of ERISA-governed insurance contracts. *Saltarelli v. Bob Baker Group Medical Trust,* 35 F.3d 382, 387 (9th Cir.1994). Here, as in *Salterelli*, review of the Plan reveals that the Plan "chose to bury" the purported immediate reemployment exclusion. *Id.* at 385. In *Saltarelli*, the 9th Circuit held that because the plan's attempted exclusion was not clear, plain, and conspicuous enough to negate the claimant's objectively reasonable expectations of coverage, it was unenforceable and the plan was liable for the coverage at issue. *Id.* at 387.

Applying these principles, the *contra proferentem* and reasonable expectations doctrines, the Court must read the "constructive termination" provision of the Plan in conjunction with the

"immediate reemployment" provision, and interpret them together in a way that gives meaning and effect to the constructive termination provision and to the purpose of the Plan. Here, the only "reasonable" interpretation, and the one that carries out the purpose of the Plan, is to give effect to the "constructive termination" provision, rather than to ignore it. To allow the "immediate reemployment" provision to override the "constructive termination" provision would render the latter provision meaningless. Rather, in the context of the Plan, "immediate reemployment" means reemployment in the same or a comparable job. A demotion is not reemployment.

2. Sluimer Was Not Offered Immediate Reemployment As Defined by the Plan

Defendants' argument about "immediate reemployment" is rendered moot by the fact that Sluimer suffered a "constructive termination". However, even apart from this, Section 3(b)(iii) of the Plan does not apply to Sluimer's situation, because "immediate reemployment" is defined to mean "uninterrupted employment such that the employee does not suffer a lapse in pay."[11] Additionally, the Plan requires that the immediate reemployment be offered with the "successor to the Company or the purchaser of its assets." *Sluimer Dec*, Ex. A, HS 004.

After the change in control, Sluimer did not have "uninterrupted employment." The Dutch Court ruling terminated Sluimer's employment effective June 23, 2006. *Reilly Dec.* Ex. H (Dutch Order) at ¶ 6. Sluimer was not offered reemployment with the "successor to the Company or the purchaser of its assets" Autonomy. The offer of employment was with a third party named Neurodynamics, not Autonomy. *Sluimer Dec.* Ex. A HS-0034-36.

Further, Sluimer did suffer a lapse in pay following the Change in Control, as his total compensation for the three month period January 2006 through March 2006 declined by approximately E 42,785 (roughly $64,000 U.S. dollars), compared to his average compensation for a three month period prior to the Change in Control. *Sluimer Dec*, ¶7. Indeed, Sluimer's average monthly pay declined by approximately 20% in January 2006; by approximately 40% in

[11] A "lapse in pay" means that there was a diminution in Sluimer's compensation. It does not mean that his pay had to completely stop. *See*, Websters's New Universal Unabridged Dictionary (1979) ("lapse" is defined as "a slipping or falling into a lower condition").

February 2006; and by approximately 35% in March 2006. [12] Since Sluimer was terminated, was not offered a position with Autonomy, suffered a significant lapse in pay following (and because of) the Change in Control, and was only offered a job that would constitute a clear demotion, Defendants failed to give Sluimer "immediate reemployment" as that term is defined in the Plan.

C. DEFENDANTS WERE NOTIFIED THAT SLUIMER WAS CLAIMING A CONSTRUCTIVE TERMINATION

Defendants argue that Sluimer did not notify them in a timely manner that he was claiming a "constructive termination". Once again, this is meritless.

1. Sluimer Notified Defendants That He Had Been Constructively Terminated

Section 2(f) of the Plan provides that, if a Plan Participant believes that an event has occurred which would qualify as a "constructive termination", the Plan Participant is to notify the Company of his belief within three months of the event. In our case, that means that Sluimer had, at a minimum, from April 18, 2006 until July 18, 2006 to notify Defendants. Sluimer gave Defendants written notice during this time period on, including, but not limited to, April 25th, May 30th and on July 13th.

On March 23, 2006, Defendants sent Sluimer a letter informing him that his old job at Verity had been made "redundant", but that they wanted to offer him an "alternative" job with Neurodynamics. *Sluimer Dec.*, Ex. B, HS 035–036. However, the March 23, 2006 letter did not have any description of what this "new" job would involve, nor what Sluimer's actual role or duties would be, nor who he would report to, nor any other of the most basic facts about this proposed job. *Id.* And, for the next month, nobody was able to answer Sluimer's questions about this when he inquired.

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[12] Sluimer's average monthly pay during the three years preceding the Change in Control had been E 45,076 per month. Sluimer's compensation fell short of this monthly average by E 8,842 in January 2006; by E18,043 in February 2006; and by E15,900 in March. *Sluimer Dec*, ¶7. This decline was a direct result of the Change in Control, since Autonomy promptly eliminated any chance for Sluimer to earn meaningful commissions or bonuses. In January 2006, Autonomy told Sluimer to stop working and thus he no longer had any responsibility for sales of the product which generated this non-salary compensation for him. Indeed, Autonomy announced that the product itself was being discontinued. *Id.* This same argument about the "lapse in pay" was presented by Sluimer to the Dutch Court. *Reilly Dec.*, Ex. C, HS 365 (¶¶20–21); Ex. E, HS 395 (¶21).

Indeed, when Sluimer subsequently called the person who was potentially going to be his boss (David Humphries) in late March, Humphries seemed "confused" and knew nothing about Sluimer or this job. All that Humphries knew in late March was that Kanter had just called him and had told him that he had "a good guy for you, his name is Hugo Sluimer, it would be great if he could work for you". *Sluimer Dec.*, Ex. B, HS 037, 039. Kanter did not even know at this point who Sluimer was going to report to, much less the details of Sluimer's expected job duties and responsibilities. *Id.*, at HS 033.

By early April, Sluimer had doubts about whether this "new" job was ultimately going to be "comparable" to his old one. *Id.*, at HS 040–041. However, Sluimer tried to do due diligence and made repeated efforts during April to get Sluimer and Humphries to explain what this "new" job's responsibilities and duties would entail. *Id.*, at ¶9; *Reilly Dec.*, Ex. E, HS 403 (¶¶43–45).

Between March 23, 2006 and late April 2006, Sluimer was bounced back and forth between Kanter and Humphries in a futile effort to have someone give him a clear explanation or description of his job duties and responsibilities, the expected plan or strategy for the business and his job, the expected revenue stream, who he would report to, how many employees he would be supervising, etc. *Sluimer Dec.*, Ex. B, HS 039, 044–045, 048–051. Kanter encouraged Sluimer to meet with Humphries in order to clarify what the job would entail. *Id.*, at HS 044–045. Humphries, in turn, told Sluimer that he would need to work out the job description with Kanter. *Id.*, at HS 048–051.

On April 18, 2006, Sluimer met for the first time with Humphries, and Sluimer was finally given information about such basics as how many employees Neurodynamics had, the business operations and sales potential for Neurodynamics, and some aspects of what Sluimer's own role might be. *Sluimer Dec.*, ¶9; Ex. B, HS 048–051. However, even at this meeting, Humphries was unable and/or unwilling to provide any sort of job description or explain Sluimer's role with any precision or provide any sense of a business plan or strategy. *Id.* Instead, Humphries again told Sluimer on April 18th that Sluimer's role was not clear to him and that Sluimer should get this sort of information from Kanter. *Id.* And, Humphries and Sluimer agreed that they should meet again on April 20th to discuss the job. *Id.* However, Defendants

promptly cancelled that meeting. *Id.*

Finally, in response to Sluimer's request that somebody give him a job description so that he could understand his duties and responsibilities and the scope of his assignment, Kanter sent Sluimer a written job description on April 24, 2006. *Sluimer Dec.*, Ex. B, HS 052–053.

On April 25, 2006, in light of his April 18th meeting with Humphries and Kanter's April 24th "job description", Sluimer wrote to Kanter and stated that the "new" job was "not comparable at all to my former job with Verity" and that he was not going to accept the job. *Sluimer Dec.*, Ex. B, HS 054–055. By this point, it was clear to Sluimer that the Neurodynamics job would involve a substantial reduction in duties and responsibilities compared to his Verity job. *Id.*, at ¶9. On April 27, 2006, Sluimer served Defendants with his Dutch lawsuit, which provided notice of the constructive termination (*See* Defendants' Mot. 3:13 & 16:18 Where they admit that the Dutch lawsuit proceeded under a "constructive termination theory".[13] *Id.*, at HS 054; *Reilly Dec.*, Ex. C, HS 360–369; *Pijl Dec.* ¶3, Ex. A, HS 124–186. On May 1, 2006, Sluimer wrote a letter to the Plan Administrator seeking payment of his Plan benefits. *Sluimer Dec.*, Ex. B, HS 057.

In sum, the earliest "event" which could possibly trigger the 90 day "notice" window for a "constructive termination" was the April 18, 2006 meeting between Sluimer and Humphries.[14] Based on this April 18, 2006 "event" date, Sluimer had until July 18, 2006 to "notify" Defendants that an event triggering his right to benefits had occurred. In fact, Sluimer notified Defendants three times during this three month period that "constructive termination" had occurred.

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[13] As explained in the Dutch court pleadings filed by Sluimer, between March 23, 2006 and April 18, 2006, Sluimer spent a great deal of time trying to investigate and understand the "new" job and obtain an explanation from Kanter and Humphries about what the job's duties and responsibilities and scope would be, so that he could properly evaluate whether the "offered" position was actually comparable to his old job. *Reilly Dec.*, Ex. E, HS 403 (¶¶43–45). As noted in the Dutch court pleadings, Sluimer had to wait until April 18, 2006 before even getting the chance to meet with Humphries to discuss the job and get some meaningful information about it. *Id.*

[14] Alternatively, the April 24, 2006 letter from Kanter would also be a potential "event" triggering the constructive termination. With these two events, Defendants made it clear to Sluimer that his "new" job would involve a substantial reduction in duties and responsibilities.

First, by letter dated April 25, 2006, Sluimer confirmed the new position was not comparable, and thus did not satisfy the Plan terms.

Second, on May 30, 2006, in connection with the Dutch court lawsuit, Sluimer notified Defendants in writing that the "new" Neurodynamics job offered to him was not comparable to his old job; that the new job involved a substantial reduction in his duties and responsibilities; and that he had therefore suffered a "constructive termination" under Section 2(f) of the Plan. *Reilly Dec.*, Ex. E, HS 399–400 (¶36), HS 397–398 (¶¶26–31); *Pijl Dec.*, Ex. A, HS 313–331.

Then, on July 13, 2006, Sluimer again notified Defendants in writing that the "new" position which had been offered to him was not comparable to his old job; that the job involved a substantial reduction in his duties and responsibilities; and that he had thus suffered a "constructive termination" per Section 2(f) of the Plan. *See*, *Sluimer Dec.*, Ex. B, HS 061–063.

Having notified Defendants on at least three separate occasions between April 18th and July 18th, Sluimer satisfied any "notice" requirements under the Plan.

2. Defendants' Proposed "Notice" Dates are Wrong

Defendants argue that Kanter's March 23, 2006 letter to Sluimer should be deemed the "event" which triggers the three month "notice" window. However, as described above, the March 23rd letter did not explain in any fashion what Sluimer's actual job duties and responsibilities would be. *Sluimer Dec.*, Ex. B, HS 035–036. Sluimer spent the next month trying to get an explanation and description from Kanter and Humphries as to what this new job would actually involve, so that Sluimer could understand whether it was truly comparable or whether it would involve a substantial reduction in duties and responsibilities. *Id.*, at 037–055. [15]

Furthermore, even if Defendants want to use the March 23, 2006 letter as the "event" which should begin the three month window, Sluimer notified Defendants in writing on April 25, 2006 and May 30, 2006 of his "constructive termination" under Section 2(f) of the Plan. *Reilly Dec.*, Ex. E, HS 399–400 (¶36), 397–398 (¶¶26–31); *Pijl Dec.*, Ex. A, HS 325–328. This

[15] Indeed, Kanter kept insisting that the job was comparable, even though he would not provide specifics or a job description until April 24th. *Sluimer Dec.*, Ex. B, HS 035–036, 040–041, 042, 044, 052–053, 054.

obviously falls within the three month window dating from March 23rd.[16]

3. Sluimer's Letter of May 1, 2006 Bars Assertion of Late Notice

As early as May 1, 2006, Sluimer had written to Autonomy and informed the Company that he believed he was entitled to Plan benefits, which had been triggered by the Change in Control. *Sluimer Dec.*, Ex. B, HS 057. As of May 1st, Kanter and Autonomy had been advised as to why Sluimer was claiming that he was entitled to Plan benefits. Indeed, Sluimer had just served his Dutch lawsuit on Defendants in the preceding few days, which laid out Sluimer's position that Defendants had failed to offer him a comparable job following the Change in Control. *Reilly Dec.*, Ex. C, HS 360–369; *Sluimer Dec.*, Ex. B, HS 054. And, during the weeks leading up to May 1, 2006, Sluimer and Kanter had been discussing whether or not the "new" job at Neurodynamics was comparable, and Sluimer and Kanter had discussed settlement proposals based on their disagreement as to whether or not Sluimer had been "terminated". *Sluimer Dec.*, Ex. B, HS 042, 045, 046, 047.

Furthermore, in his May 1st letter to the Plan Administrator, Sluimer specifically stated that, "If you need more information please do not hesitate to call me." *Sluimer Dec.*, Ex. B, HS 057. Thus, if Autonomy was truly unclear about why Sluimer believed he was entitled to Plan benefits, Autonomy had an obligation to contact Sluimer and ask for more information or an explanation as to what the exact basis was for Sluimer's claim.[17] Under ERISA, the Plan Administrator was required to provide "[a] description of any additional material or information

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[16] Defendants also argue that the 90 day window should have begun on December 29, 2005, when Defendants sent Sluimer a letter notifying him that his job "might" be made redundant. This is frivolous. Defendants have repeatedly asserted that, until late March 2006, they had made no final decision as to whether Sluimer's job was redundant, and that they continued to evaluate whether there might be an "alternative" job available for Sluimer. *Sluimer Dec*., Ex. B, HS 17, 23–24, 28, 31, 32; *Reilly Dec.*, Ex. D, HS 374–376 (¶¶11–16); Ex. F, HS 405–406 (¶2). Indeed, Defendants claim that, during the first quarter of 2006, they told Sluimer to wait and see what would happen with his old job and with any potential alternative job they might find. *Sluimer Dec*., Ex. B, HS 023–024, 028, 031, 032. Until Sluimer was definitively told that his job was eliminated and there was no new job for him, there would be no logical basis for Sluimer to claim an "event" had occurred triggering constructive termination.

[17] There is nothing in Section 2(f) of the Plan which says that the employee must use the phrase "constructive termination" when giving notice to the company of his belief that an "event" has occurred entitling him to Plan benefits. Thus, the fact that Sluimer's May 1, 2006 letter does not specifically contain the phrase "constructive termination" is not determinative of anything.

necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary." 29 C.F.R. § 2560.503-1(g)(iii).

Kanter wrote to Sluimer and informed him that his claim was denied on May 3, 2006[18]. The May 3, 2006 letter did not comply with 29 C.F.R. § 2560.503-1(g)(iii) because, among other reasons, it did not raise the alleged Constructive Termination Notice requirement and/or explain how it could be cured. Not only did Kanter fail to ask Sluimer for necessary evidence, he intentionally withheld necessary information and points he deemed to be requirements to perfect a claim in an attempt to sandbag Sluimer's claim.

It was not unit July 6, 2006 that Kanter first asserted Sluimer's claim was denied for failure to provide timely written notice of "Constructive Termination." Even if Sluimer's claim was late, which it was not, the Plan's failure to comply with the regulations tolls the running of the 90 day period to provide notice of constructive termination. *See Chuck v. Hewlett Packard Co.* 455 F.3d 1026, 1033 (9th Cir. 2006).

D. KANTER WAS NOT THE PLAN ADMINISTRATOR

When Verity created the Plan in April 2005, it gave the Plan Administrator significant powers, duties and responsibilities.[19] *Sluimer Dec.*, Ex. A. The Plan makes clear that Verity's Vice President of Human Resources was to be the Plan Administrator.[20] *Id.*, at HS 010, 012a

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[18] Obviously, if Kanter were denying Sluimer's claim, by definition, Sluimer had to have made a claim.

[19] These powers and duties included: being the "named fiduciary charged with the responsibility for administering the Plan" (¶13), and having the "exclusive discretion and authority to...decide any all questions of fact, interpretation...or administration arising in connection with the operation of the Plan, including but not limited to, the eligibility to participate in the Plan and the amount of benefits paid under the Plan." (¶8(a)). Any employee's application for benefits or inquiries about rights under the Plan was to be submitted to the Plan Administrator (¶11(a)); the Plan Administrator was responsible for providing the applicant with any notice of denial of an application for benefits and of the reasons for the denial and an explanation of the applicant's right of review (¶11(b)); any request for review was to be addressed to the Plan Administrator (¶11(c)); and the Plan Administrator was required to act on any request for review within a certain time frame (¶11(d)). *Sluimer Dec.*, Ex. A.

[20] Indeed, the Plan specified that applications for Plan benefits, and requests for a review of benefit denials, were both to be addressed to the Verity Vice President of Human Resources, Sunnyvale, California, and that the Plan Administrator was the person to respond to the employee with a decision and explanation in both instances. *Sluimer Dec.*, Ex. A, HS 010–012 (¶¶11(a), 11(b), 11(c), 11(d)).

(¶¶11(a), 13(d)). In April 2005, the Vice President of Human Resources was Jack Landers, and thus Landers was the Plan Administrator. Landers was the Vice President of Human Resources from April 2005 until his employment with the company ended in late September 2006. *Ehrman Dec.,* Ex. A (Landers Depo, 12:9–13:25; 16:11–15; 18:19–19:11; 31:22–32:19). During this entire time period from April 2005 until late September 2006, Landers was the Plan Administrator. *Id.,* at 17:11–18:18; 40:12–19; Ex. 2. And, on September 29, 2006, Kanter admitted that Landers had been the Plan Administrator up until late September 2006.[21]

As set forth in the Plan guidelines, Sluimer addressed his May 1, 2006 letter seeking Plan benefits to the Verity Vice President of Human Resources, 894 Ross Drive, Sunnyvale, California. However, Landers never played any role at all in Sluimer's claim. Ex. A to *Ehrman Dec.* (Landers Depo, 23:2–8; 24:11–17; 26:6–27:23; 28:18–29:8). Instead, on May 3, 2006, Kanter himself wrote to Sluimer and denied him Plan benefits. On July 6, 2006, Kanter again wrote to Sluimer and again denied his application for benefits.[22]

During this May through July 2006 time period, Kanter was not the Plan Administrator; Landers was.[23] Yet Landers never participated in any aspect of Sluimer's claim for Plan benefits. Landers was never shown any documentation or given any information regarding

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[21] *Sluimer Dec.*, Ex. B, HS 065–067. In the first paragraph of his September 29, 2006 letter to Sluimer, Kanter states that, "Jack Landers, the previous Vice President, Human Resources of Verity, Inc., has recently left the company, and as such I have assumed his duties as Plan Administrator within the meaning of the [Plan]." Furthermore, Landers testified that, at no time during his employment did anyone inform him that he was being relieved of his duties as Plan Administrator, nor did he ever delegate his duties as Plan Administrator to anyone else, nor was he ever told that anyone else had been appointed as Plan Administrator. *Ehrman Dec.*, Ex. A (Landers Depo, 19:12–20:11).

[22] In neither the May 3rd nor July 6th letters did Kanter claim to be the Plan Administrator. To the contrary, he signed the letter as Autonomy Company Secretary, with his address in Cambridge, England. *Sluimer Dec.*, Ex. B, HS 057–058; HS 059–060. In his July 6, 2006 letter, Kanter also informed Sluimer that if he wished to request a "review" of the denial of Plan benefits, Sluimer needed to send his request to the Vice President of Human Resources at Verity's offices at 894 Ross Drive, Sunnyvale, California–which was Landers' address. *Ehrman Dec.*, Ex. A (Landers Depo, 13:7–14; 19:4–11).

[23] Kanter admits he took over handling the dispute between Defendants and Sluimer because Autonomy policy tries to "limit communications between the company and adverse litigants." Kanter Dec., ¶4. This is hardly a valid excuse for ignoring the Plan's requirements regarding the duties of the Plan Administrator.

Sluimer's claim; was never asked for any input as to whether or not Sluimer was entitled to Plan benefits; and was never involved in drafting or reviewing any of the correspondence to Sluimer.[24] *Ehrman Dec.*, Ex. A (Landers Depo, 24:11–27:23; 28:18–29:8, and Exs. 3, 5, 6, 7, 8).

In fact, Landers had been ordered by Kanter to stay out of the process. *Ehrman Dec.*, Ex. A (Landers Depo. 25:11–26:5; 38:9–19). Thus, Kanter prevented the Plan Administrator from having any role in handling or deciding Sluimer's claim for Plan benefits.[25]

E. KANTER WAS BIASED AND HAD A CONFLICT OF INTEREST

There is a clear and unmistakable conflict of interest present here. The Plan is self-funded from the general assets of the Company and the Company serves as the Plan Administrator and Fiduciary. *Sluimer Dec.* Ex A, HS-0010 & 12. After a Change in Control, the Plan explains that it is binding upon the entity that gains control. *Id.*, at HS-0014. Thus, there is an unquestionable conflict of interest because the benefits are paid from the acquiring entity's assets and no separate assets fund the Plan.

The Supreme Court has recently held that a clear conflict of interest is creates where an employer administers an ERISA plan, and in doing so, both determines whether an employee is eligible for benefits and pays benefits out of its own pocket, a conflict of interest is created. *Metropolitan Life Ins. Co. v. Glenn*, ___ S.Ct. ___, 2008 WL 2444796 (US), *3 (June 19, 2008). A reviewing court must consider that conflict as a factor in determining whether the plan administrator has abused its discretion in denying benefits, with the significance of the factor depending upon the circumstances of the particular case. *Id*. Where (as here) circumstances suggest a higher likelihood that the conflict of interest affected the benefits decision, it may prove "of great importance." *Id*., at *7-9

Autonomy acquired Verity and immediately tried to reduce its costs. Autonomy's Chief

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[24] Indeed, Landers cannot recall even seeing the May 1, 2006 letter from Sluimer or the July 13, 2006 letter from Sluimer, even though those letters were addressed to him. *Ehrman Dec.*, Ex. A (Landers Depo, 25:22–27:23, and Exs. 5, 8)

[25] Similarly, Landers had no involvement at all in the job offer made to Sluimer in March 2006, even though as the VP of Human Resources, Landers would normally have significant involvement in that process. *Ehrman Dec.*, Ex. A (Landers Depo, 29:15–30:24; 32:25–33:3).

Operating Officer Andrew Kanter's post-merger job was to "remove unnecessary costs that are a direct result of duplication caused by the merger and therefore maintain competitiveness." *Sluimer Dec.* Ex. A HS-0020. Methods of reducing costs included terminating employees deemed redundant, while not paying benefits due under the Plan.

Even apart from the fact that Kanter was not the Plan Administrator, Kanter was an inappropriate choice to act as the decision maker with respect to Sluimer. Between March 2006 and July 2006, Kanter had been personally involved in an ongoing dialogue and dispute with Sluimer over whether or not Kanter had offered Sluimer a "comparable" or "suitable" job, and whether or not Sluimer had been "terminated" under the terms of the Plan. *Sluimer Dec.*, Ex. B, HS 035–061 (communications between Sluimer and Kanter and Humphries); *Reilly Dec.*, Exs. C–H (Dutch court pleadings). Furthermore, Kanter was personally engaged in settlement discussions with Sluimer between January 2006 and April 2006 regarding a separation package as an alternative to litigation, and the parties were unable to reach a resolution. *Sluimer Dec.*, Ex. B, HS 018, 023–024, 026–027, 040–042, 044–047.

Kanter himself appeared as the company representative and sole company witness in the Dutch lawsuit at the hearing on May 30, 2006, in order to argue that Sluimer was not entitled to severance benefits under the Plan, and that Kanter had offered Sluimer a suitable alternative job. *Pijl Dec.*, ¶¶7–10; *Reilly Dec.*, Ex. G, HS 408–409. The Dutch Judge rejected Kanter's arguments and rendered a decision against Defendants on June 7, 2006, finding that Autonomy had not offered Sluimer a comparable job and ordering the company to pay Sluimer more than EE 1,000,000 in cash severance benefits. *Reilly Dec.*, Ex. H, HS 410–412. It is safe to assume that Kanter's bias against Sluimer only increased in light of the Dutch Court's ruling.

In light of Kanter's personal history and involvement with Sluimer, it is implausible for Kanter to claim in his Declaration that he was not biased against Sluimer in May and July and September 2006 when he made the decision as to whether Sluimer would receive Plan benefits.

As a matter of law, Kanter and Autonomy faced a clear conflict of interest. *Glenn*, 2008 WL 2444796 (US), at *3. Even had Kanter been the Plan Administrator, his interpretation would be suspect. But hew was not, and Kanter's interpretations of the Plan carry no weight at all.

F. AN AWARD OF STATUTORY PENALTIES IS WARRANTED

Defendants argue that "no documents were improperly withheld from Sluimer." *Defendants Mot.* 23:6. As established in Sluimer's Cross-Motion, Plaintiff Sluimer and/or his counsel requested copies of Plan documents, the defendants were required to produce those documents and they failed to produce those documents. Defendants' failure to produce the required documents has severely prejudiced Plaintiff and this Court. Accordingly, an award of statutory fees is especially warranted here.

IV. CONCLUSION

Based upon the foregoing and Plaintiff's Cross-Motion, Plaintiff respectfully requests that defendants' Motion for Summary Judgment be denied and Plaintiff's Cross-Motion for Summary Judgment granted.

Respectfully submitted,

RIMAC & MARTIN, P.C.

DATED: June 27, 2008

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